Filed 10/27/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CITY OF BRENTWOOD, **Petitioner and Appellant,** **v.** **CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD,** **Respondent.**	**A102819** **(Alameda County Super. Ct. No. 2002 48436)**

The City of Brentwood challenges the imposition of $243,000 in mandatory minimum penalties for violations of the City's wastewater discharge permit. We construe two provisions of the mandatory minimum penalty statute. We hold that the discharger bears the burden of proving that the exceptions in Water Code section 13385, subdivision (j)(1)[1] relieve it of liability for violations that are subject to the mandatory minimum penalties. We also hold that "period of six consecutive months," as that phrase is used in section 13385, subdivision (i), is measured by looking at the 180-day period preceding each violation that potentially is subject to mandatory minimum penalties under that subdivision. We reject the City's substantive due process challenge to the

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, IV and V.

[1] All further statutory references are to the Water Code in effect at the time the Board imposed penalties on the City (i.e., § 13385 as amended by Stats. 2000, ch. 807, § 2 [hereafter Stats. 2000]), unless otherwise indicated.

amount of the penalties and its procedural due process challenge to the underlying administrative proceedings. We affirm the judgment denying the City's petition for a writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

The City of Brentwood (City) in Contra Costa County operates a wastewater treatment plant that discharges into Marsh Creek, a tributary to the San Joaquin River and Delta. Treated wastewater from the plant is first discharged into on-site percolation ponds where it either evaporates or infiltrates into the area groundwater. A mixture of groundwater and treated wastewater is then discharged into Marsh Creek. Because the plant is surrounded by agricultural land, agricultural runoff may affect the composition of the groundwater and ultimately the effluent that is discharged into the creek.

At the end of 1999 and the beginning of 2000, the City applied for a revised permit for its existing facility and a permit for a new facility. In June 2000, the California Regional Water Quality Control Board, Central Valley Region (Board) issued the City a single permit for both the existing and the new facilities. The permit established effluent limitations for discharges from the plants. As pertinent here, the permit provided that the "dissolved oxygen concentration of the discharge shall not fall below 5.5 mg/l at all times." The goal of this effluent limitation was to maintain a minimum dissolved oxygen level of 5.0 mg/l in Marsh Creek. The City was required to monitor the dissolved oxygen level of its discharge on a daily basis and to report its monitoring results to the Board by the first day of the second month following sample collection. The monitoring requirements became effective on July 1, 2000.

In its first monthly report under the new permit, which provided July 2000 monitoring results, the City tables showed that the dissolved oxygen level in the effluent from outlet 2 ranged from 2.0 to 4.6 and averaged 3.0 over the month. In a cover letter, the City wastewater supervisor noted that the levels were lower than normal and said he

did not know the cause. "The only changes noticed around the plant site is that the irrigation is now in progress with tail water going out of the new storm/irrigation pipe and construction has started. Operations are normal. To correct this problem an air diffuser manifold has been built and installed in the manhole to increase the D.O. [dissolved oxygen] level. An air blower has also been ordered and will be installed as soon as it comes in. A similar test was done with this system with very good test results for increasing the D.O. level to meet the State discharge requirement. We will continue monitoring and working on this problem until it is corrected."

The dissolved oxygen levels for August 2000 ranged from 1.9 to 4.1 mg/l and averaged 2.6 mg/l. The City's monthly report, dated September 27, 2000, again acknowledged the low levels, but explained that the air blower had been installed on September 6, 2000 and that levels had improved thereafter. In September 2000, the dissolved oxygen levels ranged from 3.0 to 3.6 mg/l for the first five days of the month, but jumped to 6.5 mg/l on September 6 and ranged from 6.5 to 7.6 mg/l thereafter.

The City maintained the required dissolved oxygen levels throughout October 2000. On two days in November 2000, seven days in December 2000, two days in January 2001, and four days in early February 2001, dissolved oxygen levels dropped below 5.5 mg/l, but not below 5.0 mg/l. The City did not draw attention to these shortfalls in its monthly reports because City officials were under the mistaken impression that the effluent limitation from its old permit, 5.0 mg/l of dissolved oxygen, was still in effect.

From February 9 to 14, 2001, the dissolved oxygen level fell below 5.0 mg/l. The City explained in its monthly report that the air blower it had installed in September had malfunctioned on February 9 and that a new blower (which was ordered on an emergency basis) did not arrive until February 14, at which time it was installed. "To eliminate any future problems the air blower will be rebuilt and used as a backup." The City maintained the required dissolved oxygen levels thereafter.

In March 2001, the Board compiled a preliminary "Record of Violations for [Mandatory Minimum Penalty] Enforcement." City representatives met with Board staff in May to request relief from the penalties, but Board staff explained that the penalties were mandatory. On June 1, 2001, the Board issued Administrative Civil Liability Complaint No. 5-01-523, which charged the City with 84 violations of the dissolved oxygen effluent limitation and proposed $243,000 in mandatory penalties calculated as $3,000 per violation times 81 violations, excluding the first three violations pursuant to Water Code section 13385, subdivision (i). The City submitted a written response to the complaint.

At the administrative hearing in July, the Board staff and City representatives presented oral testimony. At the conclusion of the hearing, the Board voted to impose the penalties in full. The City petitioned the State Water Resources Control Board (State Board) to review the regional Board's order, but the petition was dismissed. The City then petitioned the Contra Costa County Superior Court for administrative mandamus under Code of Civil Procedure section 1094.5. Venue was changed to the Alameda County Superior Court pursuant to Water Code section 13361, subdivision (b). After making evidentiary rulings, the court denied the City's petition without explanation, noting that neither party requested a statement of decision. The City appeals the trial court order.

DISCUSSION

The City raises four challenges to the mandatory minimum penalties. The first two raise questions of statutory interpretation: which party bears the burden of proving whether the exceptions in Water Code section 13385, subdivision (j)(1) apply in a particular case, and how the six-month period in section 13385, subdivision (i) should be calculated. The City also raises a substantive due process challenge to the amount of the

penalties, and a procedural due process challenge to the conduct of the administrative hearing. We address each of these arguments in turn.

I. *Burden of Proof*

The City argues that the Board failed to establish that two exceptions to liability under section 13385, subdivision (i) did *not* apply to its case. It argues that the Board had the burden of proof on this issue. The Board argues that the exceptions are affirmative defenses for which the City bears the burden of proof. The trial court denied the City's petition for writ of mandamus implicitly rejecting the City's allocation of the burden of proof.

A. *The Statute*

As relevant here, Water Code section 13385, subdivision (i) provides for mandatory minimum penalties of three thousand dollars assessed for each violation whenever the person exceeds a waste discharge requirement effluent limitation four or more times in any period of six consecutive months, "except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations." (§13385, subd. (i)(1) (Stats. 2000).) Again as relevant here, the exceptions to the mandatory assessment are an "unanticipated, grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight"; and "[a]n intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." (§ 13385, subd. (j)(1)(B) and (C) (Stats. 2000)[2].)

---

[2] In their briefing on the burden of proof issue, the parties do not discuss section 13385, subdivision (j)(1)(D) or (j)(2), which created additional exceptions to liability based on a complex set of conditions. (§ 13385, subd. (j)(1)(D), (2) (Stats. 2000).) We have not considered and do not decide whether our burden of proof analysis would apply

The issue before us is whether the exceptions to liability in section 13385, subdivision (j)(1) are elements of the offense (the Regional Board's burden of proof), or whether they are affirmative defenses (the City's burden of proof.)

B. *Parties' Contentions*

In its written response to the administrative complaint and during the administrative hearing, the City contended that the natural phenomenon exception of section 13385, subdivision (j)(1)(B) relieved it of liability for the violations.[3] The natural phenomenon cited by the City was an unidentified change in the composition of the groundwater component of the plant's effluent. The City produced no evidence that the dissolved oxygen levels had dropped in the groundwater component (rather than in the wastewater component) of the effluent, and it produced no evidence of what caused a drop in dissolved oxygen levels in the groundwater. It simply argued that the groundwater was most likely the cause of the violations because the City had found no source of the violations in its own plant. The City noted that the plant had had only one dissolved oxygen violation between 1997 and 1999. It speculated that irrigation, pesticide use and other practices on the agricultural land surrounding the plant could have affected the composition of the groundwater component of the plant's effluent.

---

to the exceptions in subdivision (j)(1)(D) and (2). When we refer to the exceptions of subdivision (j)(1), we are referring to subdivisions (j)(1)(A) to (j)(1)(C).

[3] On a slide used by the City's counsel during the hearing, the three exceptions in section 13385, subdivision (j)(1)(A) to (C) were listed, although only subdivision (j)(1)(B) was underlined. The City argues that by projecting this slide during the hearing, the City invited the Board to consider whether the third party exception of subdivision (j)(1)(C) applied to its case. None of the witnesses or Board members discussed the third party exception at the hearing. Because we ultimately conclude that the City bears the burden of proof regarding the exceptions, the City's failure to argue the third party exception to the Board defeats its claim that it is entitled to relief under section 13385, subdivision (j)(1)(C).

Addressing the statutory language, the City argued that the alleged change in the groundwater was "exceptional" because it had never occurred before, "inevitable" because it was unforeseeable, and "irresistible" because it could not be addressed instantaneously. The City further argued that the violation could not have been prevented or avoided by the exercise of due care or foresight. "[N]ever having a problem like this, not knowing what caused it, we are unsure how we could have planned for it or seen it coming."

Board staff took the position that "[t]here was no great disaster or natural phenomenon of exceptional[], inevitable, irresistible character." The assistant executive officer of the Board told Board members, "I have no reason to believe that something naturally occurred to suddenly cause the groundwater to plummet naturally in the area. I know of no mechanism for that occurring, barring major earthquakes or something." Staff speculated that the dissolved oxygen violations may have been caused by construction of the City's new plant but readily acknowledged that they did not know what caused the violations. Staff took the position that the violations were not beyond the City's control. "[I]t took the City about 3 months to correct the problem and subsequent mechanical problems gave rise to additional violations. The record demonstrates that the City could have prevented the DO violations had they better prepared and planned for it."

Board members' comments during deliberations indicate that the Board considered the burden of proof in their decision to impose penalties. Board member Christopher Cabalon expressly raised the burden of proof issue: ". . . [i]t would be a lot simpler for the State Board to issue some guidance . . . at least what the burden of proof is which is the default if you don't know" the cause of the violation of the effluent limitation. He noted that the cause of the City's violations was unknown. Board Chair Robert Schneider took the position that the Board had to assume the City was responsible in the absence of contrary proof. That is, Schneider implicitly took the position that the

City bears the burden of showing that one of the exceptions in section 13385, subdivision (j)(1) applied and had failed to meet that burden. The Board voted to impose the penalties.

In sum, it appears that the board concluded that the cause of the violations was unknown and imposed the mandatory penalties because the City had failed to affirmatively establish that one of the exceptions to liability in section 13385, subdivision (j)(1) applied.

C. *Statutory Construction*

Statutory construction is a question of law we decide de novo. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.) Our primary objective in interpreting a statute is to determine and give effect to the underlying legislative intent. (Code Civ. Proc., § 1859.) Intent is determined foremost by the plain meaning of the statutory language. If the language is clear and unambiguous, there is no need for judicial construction. When the language is reasonably susceptible of more than one meaning, it is proper to examine a variety of extrinsic aids in an effort to discern the intended meaning. We may consider, for example, the statutory scheme, the apparent purposes underlying the statute and the presence (or absence) of instructive legislative history. (See *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775-776.)

"If the words of a statute are reasonably free of ambiguity and uncertainty, we look no further than those words to determine the meaning of that language." (*Lazar v. Hertz Corp*. (1999) 69 Cal.App.4th 1494, 1503, citing *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 819.) Here, the plain language of section 13385, subdivision (j)(1) is silent as to which party bears the burden of proof. It states that the mandatory penalty provisions "do not apply" to the listed circumstances, but does not indicate which party must demonstrate, establish, or show whether those circumstances

were present. Nor does it label the exceptions "defenses" or "affirmative defenses." Because the plain language of section 13385 does not indicate which party bears the burden of proof, we must look to extrinsic aids to guide our interpretation.

1. *Statutory Scheme*

A court may consider the overall scheme in which an ambiguous statute is included in order to ascertain its intended meaning. (*Hughes v. Board of Architectural Examiners, supra,* 17 Cal.4th at p. 776.) The organization of the division, chapters, and articles is an aid to understanding its purpose. (See *People v. Hull* (1991) 1 Cal.4th 266, 272.)

Section 13385 is part of state legislation that was enacted to comply with certain provisions of the federal Clean Water Act.[4] The Clean Water Act establishes a National Pollutant Discharge Elimination System (NPDES), which prohibits discharges into the navigable waters of the United States absent a permit. (33 U.S.C. §§ 1311, subd. (a), 1312, 1342.) The Act authorizes states to issue their own NPDES permits for dischargers within their borders if the states establish programs that satisfy federal standards and that are approved by federal authorities. (33 U.S.C. § 1342, subd. (b).) Expressly for that purpose, the California Legislature enacted Chapter 5.5 of the Water Quality division of the California Water Code,[5] which includes section 13385. (§ 13370; *Sierra Club v. Union Oil Co. of California* (9th Cir. 1987) 813 F.2d 1480, 1483.)[6] Permits issued under

---

[4] The Clean Water Act is the popular title of the federal Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251-1387. (See *Gwaltney v. Chesapeake Bay Foundation* (1987) 484 U.S. 49, 52.)

[5] California Water Code, Division 7, Chapter 5.5, §§ 13370-13389.

[6] See generally 2 Manaster & Selmi, Cal. Environmental Law and Land Use Practice (2004) Water Quality Control, for history of the California legislation (§ 31.08, pp. 31-13 to 31-14; § 31.24[2], pp. 31-37 to 31-38) and division of state and federal authority in issuing water discharge permits in California (§ 31.07 at pp. 31-11 to 31-13; § 31.24[2] at pp. 31-37 to 31-38.)

Chapter 5.5, and enforced in part under section 13385, are an integral part of the Clean Water Act's discharge permit system.

The Clean Water Act is a strict liability statute. (*U.S. v. Allegheny Ludlum Corp.* (3rd Cir. 2004) 366 F.3d 164, 168; *Stoddard v. Western Carolina Regional Sewer Auth.* (4th Cir. 1986) 784 F.2d 1200, 1208; *United States v. Earth Sciences, Inc.* (10th Cir. 1979) 599 F.2d 368, 374.) "The first principle of the statute is . . . that it is unlawful to pollute at all. The Clean Water Act does not permit pollution whenever that activity might be deemed reasonable or necessary; rather, the statute provides that pollution is permitted only when discharged under the conditions or limitations of a [NPDES] permit." (*Natural Resources Defense Council, Inc. v. U.S. E.P.A.* (D.C. Cir. 1987) 822 F.2d 104, 123; see 33 U.S.C. § 1311, subd. (a).)

Enforcement of NPDES effluent limitations is based on self-monitoring and reporting; permit holders must submit regular discharge monitoring reports, which serve as admissions when discharges violate the effluent limitations established in the discharger's permit. (*U.S. v. CPS Chemical Co., Inc.* (E.D.Ark. 1991) 779 F.Supp. 437, 442.) The purpose of this system is "to keep enforcement actions simple and speedy: 'one purpose of the [monitoring] requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements of this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.' " (*Ibid.*, quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64, reprinted in 1972 U.S.C.C.A.N. 3668, 3730.)

Exceptions to liability for violations of NPDES effluent limitations under the Clean Water Act are affirmative defenses. (*CPS Chemical, supra,* 779 F.Supp. at p. 454.) Similarly, exceptions to liability under the Clean Water Act for the costs of cleaning up oil spills are affirmative defenses. (33 U.S.C. § 1321, subds. (f)(1), (f)(2), (f)(3), (g).)

Section 13385 is a part of the NPDES system. The purpose and structure of the NPDES system strongly support the argument that the exceptions in section 13385,

subdivision (j)(1) should be construed as affirmative defenses. Requiring water quality control boards to affirmatively disprove each of the exceptions in that subdivision would undermine the legislative goal of simple and swift enforcement with a minimum of fact-finding and investigation. Construing the exceptions as affirmative defenses is consistent with the fundamental structure of the permit system, which places the burden of monitoring and reporting violations on the dischargers themselves.

2. *Legislative Purpose and History*

An examination of the legislative purpose and history of the mandatory minimum penalty provisions reinforces our view that the exceptions in section 13385, subdivision (j)(1) should be construed as affirmative defenses. When construing an ambiguous statute, a court may consider its apparent purpose. (*Hughes v. Board of Architectural Examiners, supra,* 17 Cal.4th at p. 776.)

Mandatory minimum penalties were enacted in 1999 in two bills, Senate Bill No. 709 and Assembly Bill No. 1140. Both bills were signed into law. Each bill incorporated the following legislative finding: "Recent investigations indicate that current enforcement efforts of the state board and the regional boards may not be achieving full compliance with waste discharge requirements in a timely manner, and that swift and timely enforcement of waste discharge requirements will assist in bringing the state's waters into compliance and will ensure that violators do not realize economic benefits from noncompliance." (Stats. 1999, ch. 92, § 2, subd. (d) (Assem. Bill No. 1104); ch. 93, § 2, subd. (d) (Sen. Bill No. 709).) In other words, the goal of the legislation was to ensure prompt, streamlined enforcement to create a powerful incentive for dischargers to comply with permit requirements.

This clear statement of legislative purpose is amplified by reference to the statute's legislative history. While the legislation was under consideration, the Legislative Analyst's Office published an analysis and recommended passage. (Legis. Analyst,

analysis of 1999-2000 Budget Bill, Sen. Bill No. 160, pp. B-114 to B-115.) The analysis cited statistics showing administrative penalties had been levied for only one percent of the known violations of the act. (*Id.* at pp. B-113, B-115.) Mandatory penalties, the Legislative Analyst's Office wrote, would increase enforcement and make it more consistent, which would likely result in a substantial increase in compliance. (*Id.* at p. B-115.) The Legislative Analyst's Office noted that Assembly Bill No. 50 (the predecessor to Assembly Bill No. 1140) was modeled on a mandatory minimum penalty law enacted in New Jersey in 1990, and it endorsed that model. (Legis. Analyst, *supra*, at p. B-115.)

This legislative history strongly indicates that the exceptions in section 13385, subdivision (j)(1) are affirmative defenses. The mandatory penalties represent a further move away from discretion and detailed fact-finding and toward swifter and more predictable enforcement. Addressing concerns about the potential costs of increased enforcement, the Legislative Analyst's Office observed that the New Jersey experience had shown the policy to be cost-effective, in part because "staff preparation for a penalty hearing under mandatory penalties is not as labor intensive as for hearings in cases where penalties are discretionary . . . [because] less time is spent assessing mitigating factors to determine whether a penalty *should* be assessed." (Legis. Analyst, *supra,* at p. B-115.) Were we to construe the exceptions to be elements of the violation that must be proven by the Board staff, we would undermine the Legislature's intent to enact a streamlined, cost-effective and swift enforcement policy.

In sum, placing the burden of proof on the discharger rather than the Board is more consistent with the statutory scheme of the Clean Water Act and with the legislative purpose and history of the mandatory minimum penalty provisions.

3. *Descriptive Nature Test*

Whether an exception to liability is an element of an offense or an affirmative defense depends on "whether the exception is so incorporated with, and becomes a part

of the enactment, as to constitute a part of the definition, or description of the offense." (*Ex parte S.C. Hornef* (1908) 154 Cal. 355, 360.)[7] " '[W]here [the exceptions] afford matter of excuse merely,' " they are affirmative defenses. (*People v. Lawrence* (1961) 198 Cal.App.2d 54, 61 [quoting *People v. H. Jevne Co.* (1919) 179 Cal. 621, 625].) Although the genesis of these principles is criminal cases, the principles also have been applied to whether an exception to civil liability was an affirmative defense. (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1665-1669.)

Applying the descriptive nature test to a statutory construction of the exceptions in section 13385, subdivision (j)(1) supports the Board's position that the exceptions are affirmative defenses for which the City bears the burden of proof.

The offense is defined as exceeding a waste discharge requirement effluent limitation. (§ 13385, subd. (i)(1) (Stats. 2000).) The harmful conduct that the statute proscribes is the discharge of harmful substances into the state water supply. The exceptions set forth in section 13385, subdivision (j)(1) are excuses. They do not make the defendant's conduct any less harmful (the harmful substances are still discharged into the water supply), but they do provide a legal excuse to liability. The exceptions are carefully limited to circumstances outside a reasonably cautious defendant's control. The natural phenomenon must be an "unanticipated, grave natural disaster" or an "exceptional, inevitable, and irresistible" event, "the effects of which could not have been prevented or avoided by the exercise of due care or foresight." (§ 13385, subd. (j)(1)(B) (Stats. 2000).) An act of a third party will relieve the defendant of liability only if it was intentional *and* only if the defendant could not have prevented or avoided its effects with the exercise of due care or foresight. (§ 13385, subd. (j)(1)(C) (Stats. 2000).) These are

---

[7] The court of appeal denominated the test established in *Hornef* as the "descriptive nature test" in *People v. Gott* (1994) 26 Cal.App.4th 881, 886. Although the term is not regularly employed in the pertinent cases, no alternative term has been adopted, so we use *Gott*'s term.

limited exceptions to proscribed conduct, rather than exceptions that define the offense. The descriptive nature test supports placing the burden of proof on the discharger.

Based on our construction of the statute, we hold that the discharger, rather than the Board, bears the burden of proving that one of the exceptions in section 13385, subdivision (j)(1), relieves the discharger of liability for mandatory minimum penalties under section 13385, subdivision (i). The exceptions in section 13385, subdivision (j)(1) are affirmative defenses to liability. Because the Board correctly allocated the burden of proof in the City's case, we reject the City's challenge to the civil liability order on the ground that the burden of proof was improperly shifted to the City.

II. *Other Arguments*

We rely on the foregoing reasons to hold that the burden of proof under section 13385, subdivision (j)(1) rests with the discharger. We reject the other statutory construction arguments raised by the parties.

1. *Administrative Interpretation*

The City argues that the State Board's interpretation of the mandatory minimum penalty statute supports its position regarding the burden of proof. "An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.) In this instance, the administrative interpretation cited provides no guidance.

In April 2001, the State Board published a document explaining the 1999 mandatory minimum penalty statute (Senate Bill No. 709) and 2000 amendments to the statute (Senate Bill No. 2165), entitled "SB 709 and SB 2165 Questions and Answers." In these guidelines, the State Board posed and answered the question, "Who has the burden of proof, the State or Regional Board or the discharger, in determining whether the violation is subject to the mandatory minimum penalty? Violations under

section 13385 are subject to strict liability and the mandatory penalty provisions do not change the liability scheme. Under strict liability, the State or Regional Board must prove that there have been violations as specified in section 13385, subdivision (h) or (i). Once the State or Regional Board has demonstrated such violations, it becomes the discharger's burden to establish, by a preponderance of the evidence, that the amount of the penalty imposed should be less than the maximum. Since the new provisions establish statutory minimum penalties, the State or Regional Board may not assess a lesser amount. The State or Regional Board may determine at the hearing, however, that the evidence is not sufficient to make a finding that there was a violation. It is up to the discharger to provide evidence to demonstrate that the Regional Board incorrectly calculated the number of violations and the amount of the penalty. See *State of California v. City and County of San Francisco* (1979) 94 Cal.App.3d 522."

The City asserts, without explanation, that this passage supports its position that the Board bears the burden of proving that the exceptions in section 13385, subdivision (j)(1) do not apply. The City highlights the clause, "the State or Regional Board must prove that there have been violations as specified in section 13385(h) or (i)," but this clause begs the question before us: are the exceptions listed in subdivision (j)(1) elements of the violation or are they affirmative defenses? We note that the decision in *San Francisco*, cited in the guidelines, addresses an issue pertinent to a different penalty provision of section 13385. Who bears the burden of proof to demonstrate that the penalty imposed should be less than a statutory maximum? The court held that the discharger bears the burden. (*San Francisco, supra,* 94 Cal.App.3d at pp. 530-532; see also *People v. Morse* (1993) 21 Cal.App.4th 259, 272, fn. 22.)

We conclude that the administrative guidelines do not address the question before us and thus provide no guidance to our interpretation.

2. *Comparison to Other Statutes*

The City argues that if the Legislature intended the exceptions in section 13385, subdivision (j)(1) to be affirmative defenses, it would have expressly designated them affirmative defenses as it did in a hazardous waste statute, Health and Safety Code, section 25323.5. It invokes a rule that "when the Legislature uses a word or phrase in one place and omits it in another, the omission signifies the Legislature intended different meanings," citing *Lazar v. Hertz Corp., supra,* 69 Cal.App.4th at p. 1504. But *Lazar* so holds only with respect to the use and omission of terms in different parts of a *single* statute. (*Id.* at pp. 1503-1504.) Cases cited in *Lazar* apply the rule to different statutes on the same or a related subject, but the statutes at issue in those cases were so closely related as to be part of the same statutory scheme. (*City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 279-280 [comparing two provisions of the California Integrated Waste Management Act]; *Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497 [comparing two consecutive code sections addressing financial responsibility requirements for drivers].)

In contrast, the hazardous waste statute cited by the City is not part of the same statutory scheme as section 13385, subdivision (j)(1). It is "related" to section 13385 only in the attenuated sense that both statutes address environmental concerns. The statutes are too remotely related to support the inference suggested by the *Lazar* rule.

Moreover, the use of the express term "defenses" in the hazardous waste statute is easily explained by that statute's direct incorporation of standards from federal law. Health and Safety Code section 25323.5 is part of a statutory scheme enacted to take advantage of certain provisions of the federal hazardous waste law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. (See Health & Saf. Code, § 25301, subd. (c).) The California statute defines liable persons by reference to a provision of CERCLA (Health & Saf. Code, § 25323.5, subd. (a)(1) [" 'Responsible party' or 'liable person,' . . . means those persons

described in Section 107(a) of the federal act (42 U.S.C. Sec. 9607(a))"]), and it provides that the defenses available to liable persons "shall be those defenses specified in Sections 101(35) and 107(b) of the federal act (42 U.S.C. Secs. 9601(35) and 9607(b))" (Health & Saf. Code, § 25323.5, subd. (b)). Thus, Health and Safety Code section 25323.5 incorporates the term "defenses" from the federal statute.

The California Legislature does not consistently use express language when it intends to create an affirmative defense. The California Supreme Court has repeatedly construed exceptions to liabilities in criminal statutes as affirmative defenses under the descriptive nature test even when they are not expressly labeled "affirmative defenses" or "defenses" and even when they use no other express language to indicate which party bears the burden of proof with respect to the exceptions. Therefore, the absence of express language designating the exceptions in section 13385, subdivision (j)(1) as affirmative defenses is not particularly instructive.

3. *Rule of Lenity*

The City argues that the rule of strict construction for criminal statutes, also known as the rule of lenity, should apply here because section 13385 is a civil penalty statute. (See *People v. Perez* (1998) 68 Cal.App.4th 346, 357.)

The argument is not convincing both because of the language and purpose of the statute and because "the rule of strict construction of penal statutes has generally been applied in this state to criminal statutes, rather than statutes which prescribe only civil monetary penalties." (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312.)

4. *Rule of Convenience*

The Board invokes the rule of convenience, which permits the burden of proof to be shifted to the defendant if there is "a manifest disparity in the convenience of proof and opportunity for knowledge of the parties." (*People v. Gott* (1994) 26 Cal.App.4th

881, 889.) This rule has been applied in civil cases. (*Fletcher, supra,* 110 Cal.App.4th at pp. 1670-1674.) Applying the rule here, we can only conclude that the discharger is in a better position than the Board to establish whether its own operations caused the violations.

III. *Six-Month Period*

Mandatory minimum penalties were imposed on the City pursuant to section 13385, subdivision (i), which provides: "[A] mandatory minimum penalty of three thousand dollars ($3,000) shall be assessed for each violation whenever the person does any of the following *four or more times in any period of six consecutive months*, except that the requirement to assess *the mandatory minimum penalty shall not be applicable to the first three violations*: (A) Exceeds a waste discharge requirement effluent limitation." (§ 13385, subd. (i)(1) (Stats. 2000), emphasis added.) The statute defined "period of six consecutive months" as "the period beginning on the day following the date on which . . . one of the violations described in subdivision (i) occurs and ending 180 days after that date." (§ 13385, subd. (h)(2)(C) (Stats. 2000).)

The State Board has interpreted "any period of six consecutive months" as a "rolling" six-month period. Consistent with this interpretation, the regional Board applied the provision by looking at the six-month period preceding each violation. If the violation was at least the fourth violation in the preceding six-month period, the penalty was imposed. The City argues that the six-month period should be measured from the date of a first violation. After that six-month period expires, a new six-month period would commence with the next violation. The first three violations in the second six-month period would be exempt from the mandatory penalties, even if they occurred less than six months after the most recent three prior violations. Had the Board followed the City's approach, the first six-month period would have expired on January 2, 2001; that is, 180 days after July 6, 2000, the day following the date of the first violation. A new

six-month period would have commenced on January 3, 2001, the date of the first violation following the expiration of the first six-month period. The first three violations in the second six-month period would be exempt from the mandatory minimum penalty requirement, resulting in a $9,000 savings to the City.

A. *Judicial Notice*

As a preliminary matter, we take judicial notice of a letter sent by legislators to the executive officer of the State Board to protest the State Board's original interpretation of six-month period in the mandatory minimum penalty provisions. (Evid. Code §§ 452, subd. (h), 459, subd. (a).)

We reject the City's argument that the letter is not an appropriate subject of judicial notice regarding the legislative history of the statute. Letters expressing the opinions of individual legislators often are irrelevant to an issue of statutory construction, which depends on the intent of the entire Legislature, not of individual legislators. (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062 & fn. 5.) This particular letter is relevant to our review of the legislative history because it apparently prompted a change in the State Board's interpretation of the statute, and the Legislature amended the statute to define six-month period against the background of that administrative interpretation. It is relevant merely because it illustrates the context in which the Legislature enacted the definition of "period of six consecutive months." (Cf. *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161, fn. 3.)

B. *Plain Language*

As noted, when interpreting a statute our duty is to give effect to the intent of the Legislature. We first look to the words of the statute, giving them their ordinary meaning.

The language of section 13385 is ambiguous. The phrase "any period of six consecutive months" supports the Board's interpretation because "any" suggests an

interpretation that imposes penalties *whenever* a violation can be shown to have occurred within six months of three prior violations. At the same time, the definition of "period of six consecutive months" can be construed to support the City's interpretation. By requiring the six-month period to be measured prospectively from a violation ("the period *beginning* on the day following the date on which . . . one of the violations described in subdivision (i) occurs and ending 180 days *after* that date" (§ 13385, subd. (h)(2)(C) (Stats. 2000), emphasis added), rather than defining "period of six months" simply as 180 consecutive days, the definition suggests that the six-month period in section 13385, subdivision (i) is fixed rather than shifting or "rolling," as the State Board currently describes it.

Again, because the statutory language is open to conflicting interpretations, we look to the legislative history and purpose of the statute to inform our interpretation.

C. *Legislative History*

When the mandatory minimum penalty provision was enacted in July 1999, the statute did not include a definition of six-month period. (§ 13385, as amended by Stats. 1999, ch. 993, § 6.) On December 6, 1999, the chief counsel for the State Board prepared a memorandum for the executive officer of the State Board providing his interpretation of the new statute.[8] The memorandum provided the following guidance on calculating the six-month period mentioned in section 13385, subdivisions (h) and (i): "To calculate violations under the act, the six-month period starts with the first violation in any category subject to CWC [California Water Code] section 13385(h) or (i) and runs for six months following the first violation in any category subject to CWC section 13385(h) or (i). For example, if a discharger violates an effluent limitation that

[8] Chief Counsel, State Water Resources Control Board, The Clean Water Enforcement and Pollution Prevention Act of 1999 ("SB 709") Summary and Questions and Answers, p. 9, Dec. 6, 1999.

constitutes a serious violation in February 2000, the six-month period for calculating penalties for serious violations begins. At the end of the six months, the Regional Board must determine how many serious violations occurred. . . . Once each six-month period ends, a new six-month period will begin for the discharger when a violation described in subsection 13385(h) or (i) occurs."[9] This interpretation is consistent with the City's proffered interpretation of the statute.

However, in a January 18, 2000, letter to the Executive Officer of the State Board, five legislators including Assemblywoman Carole Migden, the author of the mandatory minimum penalty legislation, and Senator Byron Sher, the author of the 2000 amendment to the statute, objected to the chief counsel's interpretation of the six-month period. "The proposed interpretation of the term 'any six month period' undermines one of the basic purposes of the law -- discouraging repeat violations.[¶] . . .[¶] The Counsel's interpretation of the law undermines the deterrent effect by proposing that a discharger is cleared six months after their first violation regardless of whether or not they have come into compliance. For example, under the proposed interpretation, a discharger who violated a monthly average permit every month between January and September would only be subject to mandatory penalties for the months of April, May and June, then its slate would be cleared arbitrarily. The discharger clearly does not have as great an incentive to avoid triggering the threshold and no incentive to come into compliance with the law for at least six months. If the Legislature had intended such an artificial cut-off period, it would have specified 'six months from the first violation' rather than '*any* six month period.' "[10]

---

[9] State Water Resources Control Board, p. 9, Dec. 6, 1999.

[10] The legislators' letter refers to the phrase "any six month period." This is the language used in the original legislation that enacted the mandatory minimum penalty provisions. (§ 13385, subd. (i)(2)(A), as enacted by Stats. 1999, Chap. 93, § 6.) (The Assembly bill used slightly different language, "any 180-day period" (§ 13385, subd. (i)(2), as enacted by Stats. 1999, Chap. 92, § 7), but the language of the Senate bill,

In February 2000, Senator Sher introduced a bill to amend section 13385, subdivisions (h) and (i), the mandatory minimum penalty provisions. (Sen. Bill No. 2165 (1999-2000 Reg. Sess.) § 1.) He and other legislators prepared the amendment in response to Governor Davis's request, when he signed the 1999 legislation, that the Legislature consider amendments that would provide some flexibility in applying the mandatory penalties.[11] Senate Bill No. 2165, as originally proposed, did not address the six-month period language.

On March 22, 2000, the State Board's chief counsel wrote an addendum to his December 1999 memorandum. He explained that he was responding to "several more questions concerning SB 709 that were either not addressed in the December 6, 1999, Memorandum or are in need of revision." He revised his interpretation of " 'any six-month period' ": "Under CWC section 13385(i)(2)[12], . . . [t]he six-month period should be calculated as a 'rolling' six months. For example, if the discharger violates an effluent limitation in January, April, May, July, August (2 violations), and October, . . . [t]he Regional Water Board must look at each new violation and review violations for the preceding six-month period. In April there were only two violations for the preceding six months; in May there were only three violations for the preceding six months; in July there were only three violations for the preceding six months; in August there were five violations for the preceding six months. The discharger would then be subject to a mandatory penalty of $6,000 because it had four or more violations in the preceding six-

---

which was enacted second and was assigned a higher chapter number, prevailed over the language of the Assembly bill. (Gov. Code, § 9605.))

[11] Governor's Letter to the Senate (July 12, 1999).

[12] At the time this memorandum was written, section 13385, subdivision (i)(2)(A) to (D) provided for mandatory minimum penalties when certain violations occurred four or more times in a six-month period. (Stats. 1999, ch. 93, § 6.) At the time penalties were imposed on the City, these provisions were codified in section 13385, subdivision (i)(1) to (4). (Stats. 2000, ch. 807, § 2.)

month period (April, May, July, and August), but the first three are not assessed a penalty."[13]

On May 8, 2000, Senate Bill No. 2165 was modified to include a definition of "period of six consecutive months." (Sen. Amend. to Sen. Bill No. 2165 (1999-2000 Reg. Sess.) § 2, May 8, 2000.) That definition was included in the final version of the bill, enacted in September 2000. (§ 13385, subd. (h)(2)(C) (Stats. 2000), effective Jan. 1, 2001.)

In April 2001, the State Board published guidelines for the interpretation of the amended mandatory minimum penalty statute, "SB 709 and SB 2165 Questions and Answers."[14] Regarding the six-month period, the State Board explained: "SB 2165, which became effective on January 1, 2001, . . . added a clarifying definition of a 'period of six consecutive months' in order to facilitate the necessary calculations (because the months have differing numbers of days). The period is now defined as the 180 days immediately following the first violation. Because this merely ratifies the period that the State and Regional Boards have been using, this definition is not considered to be a substantive change in the law."[15]

An attachment to the April 2001 guidelines provides graphs illustrating how the six-month period should be calculated in five different situations.[16] This attachment illustrates that the State Board still adhered to the "rolling" interpretation of six-month period, as described in the March 2000 memorandum. In February 2002, the State Board published a Water Quality Enforcement Policy, which was adopted as official policy by

---

13 Chief Counsel William R. Atwater, Addendum to memorandum of Dec. 6, 1999 to Walt Pettit, Mar. 22, 2000.

14 State Water Resources Control Board, Apr. 17, 2001.

15 State Water Resources Control Board, Apr. 17, 2001, Question 33, p. 12.

16 State Water Resources Control Board, Apr. 17, 2001, pp. 29-31.

way of regulation in July 2002. (See Cal. Code Regs., tit. 23, § 2910.) This policy statement reaffirms that the six-month period in section 13385, subdivision (i), "is calculated as a 'rolling' 180 days."[17] Section 13385 was amended again in 2001 and 2002, but the definition of "period of six consecutive months" was never modified to alter the "rolling" interpretation of six-month period. (Stats. 2001 ch. 869, § 7; Stats. 2002 ch. 1019, § 2, ch. 1019, § 3.)[18]

Based on this legislative history, we conclude that the State Board's "rolling" interpretation of the six-month period is consistent with legislative intent. Senate Bill No. 2165 was enacted on the background of the State Board chief counsel's interpretation of the 1999 statute. Specifically, the "period of six consecutive months" definition was added following the chief counsel's March 2000 adoption of a "rolling" interpretation of the six-month period in section 13385, subdivision (i). The State Board's April 2001 guideline explains that the definition of "six-month period" in the statute was enacted to address the ambiguity of "six months" in light of the differing lengths of the calendar months.

Had the Legislature intended to challenge the chief counsel's interpretation of the period as "rolling," we would expect them to have done so explicitly. The State Board continued to adhere to the "rolling" interpretation in its April 2001 and February 2002 interpretations and the Legislature amended section 13385 again in 2001 and 2002 without changing the definition of the six-month period in relevant part. The

---

[17] State Water Resources Control Board, Apr. 17, 2001, p. 29.

[18] In 2002, the definition of "period of six consecutive months" was moved from section 13385, subdivision (h)(2)(C) to subdivision (i)(2); the word "beginning" was changed to "commencing," the reference to serious violations was omitted, and the phrase "the day following" was omitted, thus shortening the calculation of the six-month period by one day. (Stats. 2002, ch. 1019, § 3.)

Legislature's silence in the face of the State Board's consistent and explicit interpretation signals the Legislature's acceptance of that interpretation.

D. *Legislative Purpose*

The "rolling" interpretation of the six-month period also best effectuates the deterrent purpose of the mandatory minimum penalties by providing the discharger with a clear disincentive to reach the three-violation threshold and a clear incentive to get into compliance for at least six months after being fined. The City's interpretation, on the other hand, lets a repeat violator escape liability at the expiration of an arbitrary six-month period, even if the violations have continued unabated. This escape period bears no relation to the purpose of the law, which is to guarantee more consistent enforcement and thereby deter repeat violations of water quality standards.

The legislative history and purpose of the statute strongly support the Board's interpretation of "period of six consecutive months" in section 13385, subdivision (i) as "rolling." The City's argument that mandatory penalties should not have been imposed for three of the violations in 2001 fails.

IV. *Substantive Due Process*

The City argues that the $243,000 penalty was unconstitutionally excessive in violation of substantive due process guarantees.

A. *Due Process Rights of a Municipality Vis-à-Vis the State*

A threshold issue is whether the City, a political subdivision of the State of California, has a constitutional right to due process vis-à-vis its creator, the State of California. (*Star Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6 ["subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment"]; *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296-297 [holding that same reasoning applies to due process protections under the

California Constitution].) We requested supplemental briefing on the issue. The City argues that the *Star Kist* rule should not apply when a municipality challenges state action that does not peculiarly apply to municipalities but is equally applicable to private persons. For example, the mandatory minimum penalties authorized in section 13385, subdivision (i) apply to any discharger that violates the effluent limitations of its discharge permit, regardless of whether that discharger is a private or a public entity. Expressed differently, the City argues that the *Star Kist* rule should not apply to a municipality acting in its proprietary capacity, but only to a municipality acting in its governmental capacity. This is an unsettled area of the law. (Compare *City of Charleston v. Public Serv. Com'n of W. Va.* (4th Cir. 1995) 57 F.3d 385, 389 [concluding that it is settled, absent state law to the contrary, that a municipality cannot assert a federal Contract Clause claim against its state even when the municipality contracted in its proprietary capacity] with *Rogers v. Brockette* (5th Cir. 1979) 588 F.2d 1057, 1069-1070 [interpreting Supreme Court law to implicitly hold that a municipality can assert a federal constitutional challenge against impairments of its contract or property rights when acting in its proprietary capacity].) Because we conclude that the City cannot prevail on its arguments, even assuming it has a right to challenge the actions of the Board on substantive due process grounds, we need not resolve this threshold question.

B. *Hale v. Morgan*

In support of its substantive due process argument, the City relies on *Hale v. Morgan* (1978) 22 Cal.3d 388 (*Hale*), which held that mandatory minimum civil penalties imposed on a landlord, which had accumulated on a daily basis over a six-month period, were unconstitutional as applied. In a later case, *Kinney v. Vaccari* (1980) 27 Cal.3d 348 (*Kinney*), the Court held that imposition of penalties under the same landlord-tenant civil penalty statute were constitutional as applied in the circumstances of that case. In a third case, *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, the court of appeal held that enforcement of a mandatory civil penalty

against a landlord was constitutional in the circumstances of that case.[19] Our review of these three opinions persuades us that the imposition of mandatory penalties in this case was constitutional.

Legislation violates substantive due process only in narrow circumstances. "In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute." (*Hale, supra,* 22 Cal.3d at p. 398.)

The imposition of mandatory minimum civil penalties that accumulate over a period of time may "in a given case, be a perfectly legitimate means of encouraging compliance with law." (*Hale, supra,* 22 Cal.3d at p. 404.) The constitutionality of such a statute must be determined on a case-by-case basis (*ibid.*), taking into consideration several factors: the amount of discretion available to the trier of fact, the potential for the penalties to accumulate indefinitely, the relative sophistication of the plaintiff and defendant, provocation by the plaintiff or egregious behavior by the defendant, the range of culpable conduct subject to a uniform penalty, the range of injuries resulting from conduct subject to a uniform penalty, the relative severity of penalties imposed for similar conduct, and the financial impact of the penalties (*Kinney, supra,* 27 Cal.3d at pp. 352-353; *Hale, supra,* 22 Cal.3d at pp. 404-405). Having considered these factors, we conclude that the penalties were constitutional as applied in this case.

1. *Lack of Discretion*

The City places great emphasis on the Board's inability to exercise discretion when imposing mandatory minimum penalties under section 13385. As in *Hale*, the City argues, "[t]he exercise of a reasoned discretion is replaced by an adding machine."

---

[19] In its opposition brief, the Board cited a fourth case, *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 112 Cal.App.4th 1377. The brief was filed on January 22, 2004; the California Supreme Court granted review on January 28, 2004. The case may no longer be cited. (Cal. Rules of Court, rules 976(d); 977(a).)

(*Hale, supra,* 22 Cal.3d at p. 402.) The City specifically cites the comments of the Board chair during deliberations that the Board felt uncomfortable imposing the mandatory penalties, which seemed disproportionate to the City's misconduct, but they had no choice.

Hale does not hold that mandatory minimum penalties are per se unconstitutional. Although the civil penalty statute in that case was "mandatory, mechanical, potentially limitless in its effect regardless of circumstance, and capable of serious abuse," the court nevertheless concluded that the law could be constitutional as applied. (*Hale, supra,* 22 Cal.3d at p. 404.) Two years later, the court held that *Kinney* was such a case. (*Kinney, supra,* 27 Cal.3d at p. 353.) The nondiscretionary nature of the section 13385 penalties brings them within the scope of the *Hale* analysis, but does not conclude the analysis.

The discomfort that the Board chair expressed in imposing mandatory penalties indicates that the penalty provision was working as intended, not that it had created an anomalous result. The mandatory penalty provision was enacted precisely because legislators believed the state and regional boards had been too reluctant to penalize violators. It is expected that Board members feel some tension between their own sense of proportionality and the nondiscretionary directive to impose substantial minimum penalties, reflecting the Legislature's very different sense of proportionality.

2. *Potentially Unlimited Duration*

The City also argues that section 13385 is constitutionally suspect because the penalties are effectively assessed on a per day basis. Although the statute assesses penalties "for each violation" the Board counted the City's dissolved oxygen violations on a daily basis because the City's permit required the City to monitor dissolved oxygen levels in its effluent on a daily basis.[20] In *Hale*, the landlord, who cut off utilities to his

[20] At oral argument, the City challenged the Board's interpretation of "for each violation" as a matter of statutory construction. The City did not present a statutory construction argument in its appellate briefs. Rather, the City argued that the daily accumulation of the penalties was one of several factors that rendered the resulting $243,000 penalty unconstitutional under *Hale*. The City argued that section 13385,

tenant's mobile home with the intent to evict him, accumulated penalties at $100 a day for 173 days. (*Hale, supra,* 22 Cal.3d at p. 393.) In finding the penalties unconstitutionally excessive, the court observed, "[I]mportantly, the duration of the penalties is potentially unlimited, even though the landlord has done nothing after the initial wrongful termination of utility service except fail to restore it." (*Id.* at p. 399.) The City argues that its penalties accumulated in a similar manner. It argues that the alleged violations arose from two discrete events, the unexplained drop in dissolved oxygen levels on July 5, 2000 and the breakdown of the air diffuser in February 2001. Yet the penalties accumulated on a daily basis, for a potentially unlimited period, even though the City did nothing wrongful following each of those events but instead worked diligently to solve the problems.

Hale did not universally condemn penalties that indefinitely accumulate on a daily basis until the violation is corrected. In fact, it expressly declined to do so. (*Hale, supra,* 22 Cal.3d at p. 404.) There is an obvious legitimate reason for the daily accumulation of the penalties under section 13385, subdivision (i). It creates a powerful incentive to correct the violation and to stop the discharge of harmful effluents.

3. *Sophistication and Culpability of the Parties*

The City argues that the penalty is unconstitutionally disproportionate to its culpability, especially because the Board delayed in enforcing the law, thus allowing the penalties to accumulate to an enormous sum.

In *Hale*, the court relied heavily on the disparate sophistication and culpability of the parties to conclude that the penalties imposed were unconstitutionally excessive. *Hale* arose from a landlord-tenant dispute in which a relatively small-time landlord

---

subdivision (i) was unconstitutional *as applied* in its case, requiring reversal or reduction of the penalties it was ordered to pay, not that § 13385, subdivision (i) is unconstitutional as interpreted by the Board, requiring invalidation or reinterpretation of the statute. For the reasons stated, we reject the argument that § 13385, subdivision (i) is unconstitutional as applied to the City. We decline to address the City's statutory construction argument, which was untimely raised at oral argument. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.)

overreacted to deliberate transgressions by a tenant, who then dragged his feet and allowed immense civil penalties to accumulate. In the end, the tenant stood to reap an enormous windfall after suffering minimal hardship. (*Hale, supra,* 22 Cal.3d at pp. 403-404.) The penalty provision, the court observed, created a perverse incentive for "the occasional experienced and designing tenant to ambush an unknowing landlord." (*Id.* at p. 403.)

In *Kinney*, by way of contrast, the landlord's behavior was truly egregious. The landlord cut off utilities during harsh winter weather to units that housed seven minor children, a woman who gave birth during the cut-off, and eight other adults; he refused to restore utilities even though the tenants tendered enough back rent to cover the utility bill; he defied court orders to restore the utilities; and he demanded that the tenants drop their lawsuit before he restored utilities. (*Kinney, supra,* 27 Cal.3d at pp. 354-355.) The tenants did not provoke the violations. Although they were behind in rent, they had paid twice as much money as was owed in utilities. (*Id.* at pp. 353-354.) Moreover, the tenants attempted to mitigate the damages rather than allowing the penalties to accumulate into a large award. They repeatedly tendered their past-due rent payments to cover the utility bill, but the landlord refused to accept the funds. (*Id.* at pp. 354-355.)

Here, the City strenuously professes its innocence and good faith, arguing that the City plant did not cause the violations; the City could not have anticipated the drop in dissolved oxygen levels, which were unprecedented in the history of its plant; and the City acted diligently when the problem came to its attention. Even assuming these assertions to be true, we reason that culpability cannot be decisive in the section 13385 context. Unlike the landlord-tenant civil penalty statute at issue in *Hale* and *Kinney*, which penalized *willful* conduct (*Kinney, supra,* 27 Cal.3d at p. 352 [quoting Civil Code, § 789.3, as added by Stats. 1971, ch. 1275, § 1]; *Hale, supra,* 22 Cal.3d at p. 393 [same]), section 13385 is a strict liability statute. The goal of the statute is to create an economic incentive for scrupulous compliance with water quality standards and prompt correction of any violations. The imposition of mandatory minimum penalties for each violation (which occur on a daily basis when a daily monitoring requirement applies) creates a

powerful incentive to correct violations that promptly come to the discharger's attention due to the monitoring requirements. Because the statute was not designed to penalize egregiously culpable behavior, but rather to curtail significant discharges of potentially harmful matter to the environment, the City's purportedly blameless behavior is beside the point. There is no apparent discrepancy between the goals of this strict liability provision and its application in the City's case.

The City also argues that the Board acted improperly by delaying enforcement until the mandatory penalties had already added up to an oppressive amount. The City cites *Sainez*, where the court held that the imposition of $767,000 in mandatory penalties against a landlord was constitutionally acceptable based in part on the city's (there, the party seeking the penalties) exercise of *restraint* in seeking the penalties. The city had "worked at length with defendants toward a resolution that would avoid litigation," providing extensions of time and warnings before referring the case to the city attorney despite repeated violations of the housing code and lack of cooperation by the landlord. (*Sainez, supra,* 77 Cal.App.4th at pp. 1306, 1314-1315.) Here, the City argues, the Board did nothing for eleven months (from July 5, 2000, the date of the first violation, until June 1, 2001, the date the administrative complaint against the City), allowing the penalties to add up to almost one quarter of a million dollars before informing the City of its liability. In fact, the Board prepared its first record of violations in late March 2001 and Board staff met with City officials to discuss the potential imposition of penalties on May 4, 2001. The minutes of the May 4, 2001 meeting indicate that its purpose was to discuss a liability order issued for violations of the City's permit and City representatives arrived with a consultant who presented fairly well developed arguments in opposition to the penalties. These circumstances suggest that the City received notice of the impending penalties prior to that meeting. To demonstrate the unreasonableness of the Board's conduct, the City cites current State Board enforcement policy, adopted in February 2002, which instructs regional boards to issue mandatory minimum penalties "within seven months of the time that the violations qualify as mandatory minimum

penalty violations, or sooner if the total mandatory penalty amount is $30,000 or more. This will encourage the discharger to correct the violation in a timely manner."

As to the violations that fell below 5.0 mg/l in dissolved oxygen levels, the amount of the penalties cannot be attributed to any delay in enforcement by Board staff. The City admits it was aware of the violations from the first day the dissolved oxygen levels dropped on July 5, 2000 and again on February 9, 2001, and it claims that it acted diligently in attempting to remedy the situation. There is no reason to believe earlier intervention by Board staff would have altered the outcome of the mandatory penalty proceeding. Moreover, the earliest Board staff learned of the violations was on September 5, 2000, the date they received the City's discharge monitoring report for July 2000. By that date, the City had already solved the problem. The violations ceased on September 5, 2000 and did not occur again until November 2000. Similarly, the violations that began on February 9, 2001 ceased on February 14, 2001, long before Board staff was ever informed of the violations. Therefore, the accumulation of mandatory penalties for these violations cannot fairly be attributed to negligent enforcement by the Board.

The same can be said of the violations that fell between 5.0 and 5.5 mg/l. Due to the City's mistaken belief that the dissolved oxygen requirement was 5.0 rather than 5.5, prompt enforcement by the Board might have limited the number of violations within this range. The City has only itself to blame for this error. The City weakly argues that it was misled about the terms of the new permit, but the permit itself, which was mailed to the City on June 26, 2000, is unambiguous. It expressly states that the City's prior permit (which governed the existing facility) was rescinded and then sets forth several discharge requirements. The dissolved oxygen requirement was unambiguous: "The dissolved oxygen concentration of the discharge shall not fall below 5.5 mg/l at all times." Another effluent limitation was drafted to apply only "[a]fter the treatment plant expansion" and other provisions in the permit applied "[u]pon completion of the new facilities," but there was no such qualification in the dissolved oxygen requirement.

Moreover, Board staff did not learn of the violations that fell between 5.0 and 5.5 mg/l until December 28, 2000, the date it received the City's discharge monitoring report for November 2000. By then, nine of the 15 violations had already occurred, and the last of the violations occurred on February 8, 2001. Even prompt enforcement would have averted only a few if any of the penalties from accumulating.

In sum, the alleged innocence of the City and negligence of the Board fail to demonstrate that the penalties imposed in this case are so disconnected to the legislative goals of the penalty statute as to violate principles of substantive due process. The penalties create an economic incentive to anticipate, detect and promptly correct any violations of effluent limitations for entities that discharge substances into the state's waters. The penalties served their purpose in this case.

4. *Range of Conduct and Injuries Subject to Penalties*

The City argues that section 13385 is constitutionally suspect because it imposes similar penalties on violators with vastly different culpability and for violations with vastly different effects on the environment. The City incurred nearly a quarter million dollars in penalties, it observes, even though "[t]his is not a case about arsenic, or some toxic chemical, being dumped into drinking water."

The City's protests are unconvincing. First, the statutory scheme is calibrated to impose more severe penalties on the more culpable violators. The Water Code imposes criminal penalties on persons who deliberately or negligently violate waste discharge requirements and even more severe criminal penalties if the violation "places another person in imminent danger of death or serious bodily injury" (§ 13387, subds. (a)(2), (d), as amended by Stats. 1996, ch. 775, § 5). Moreover, the civil penalty provisions treat first offenders less severely than repeat offenders. A state or regional board can redirect a penalty for a first serious violation to a supplemental environmental project (§ 13385, subds. (h)(1), (h)(2)(b) (Stats. 2000)), and dischargers incur no penalty for the first three non-serious violations in a six-month period (§ 13385, subd. (i) (Stats. 2000)). The civil penalty provisions also distinguish between "serious" violations that incur penalties from

the first violation and "non-serious" violations that incur penalties only if they occur four or more times in a six-month period. (§ 13385, subds. (h), (i) (Stats. 2000).) Inevitably, there will be some discrepancies in the culpability of violators or the harmfulness of violations punished under this strict liability mandatory penalty provision, but the statute is well within the constitutional requirement of a rational relationship between its purpose and its effect.

Second, it is not self-evident that low dissolved oxygen levels produce significantly less environmental harm than the other violations covered by mandatory minimum penalty provisions. Notably, the City's permit documents devote more space to discussion of oxygen requirements than to arsenic discharges. The City concedes that low dissolved oxygen levels can kill off aquatic life, but it argues that its own violations did not lower dissolved oxygen levels in Marsh Creek far enough or long enough to kill any life. A state need not wait for environmental damage to occur before it penalizes conduct threatening to the environment. Deterring conduct potentially destructive of the environment is a legitimate governmental interest.

5. *Penalties for Similar Transgressions*

The City does not offer any argument regarding this factor.

6. *Financial Impact*

The City argues that the financial impact of the penalties, which amounted to ten percent of its annual sewer budget, demonstrates that the penalties were unconstitutionally excessive. In *Hale*, the financial impact of the penalties was so extreme as to be "confiscatory." (*Hale, supra,* 22 Cal.3d at p. 405.) The small-scale mobile home park at issue there appeared to be "a modest operation by a relatively unsophisticated landlord." (*Ibid.*) Given the size of the penalties, the court observed, a trespassing, deadbeat tenant could have ended up owning the mobile home park, a result it found "wholly disproportionate to any discernible and legitimate legislative goal, and . . . so clearly unfair that it cannot be sustained." (*Ibid.*)

This case is easily distinguishable. Although the City is not a large, for-profit corporation that must suffer a severe financial penalty to experience a deterrent effect, as in *Sainez* (*Sainez, supra,* 77 Cal.App.4th at pp. 1317-1319), it is not a small business owner such as the landlord in *Hale* either. A public entity is entirely different. Publicly owned wastewater treatment plants were identified as repeat violators in the Legislative Analyst's Office report, and the office advised that more frequent assessment of penalties was necessary bring these plants into compliance. (Legis. Analyst, analysis of 1999-2000 Budget Bill, Assembly Bill No. 1104 (Feb. 16, 1999) pp. 11, 12.) As a public entity, the City may be able to spread the costs of the penalties among the homeowners and business owners who are connected to the City's sewer system.

The City contends the amount of the penalty is unfair in light of the $48 million it had already committed to building a new wastewater treatment plant. As one of the Board members noted at the administrative hearing, the new plant was built to accommodate rapid growth, which the City itself authorized and stood to benefit from. That new growth likely will generate revenue to help pay for the new plant construction. The City's attempt to characterize the construction as a gratuitous environmental remedial project is disingenuous.

We note that the substantial penalty levied in this case will not line the pockets of a "designing" plaintiff, as in *Hale*, but will be paid into a state fund used to clean up the environment. (§ 13385, subd. (m) (Stats. 2000).) In *Sainez* too the penalty was used in part to fund housing code enforcement efforts (*Sainez, supra,* 77 Cal.App.4th at p. 1315), a fact that marked "a significant difference from the penalty scheme in *Hale* and *Kinney*, which gave tenants a windfall beyond their actual damages and costs." (*Sainez,* at p. 1315.) The same is true here.

The City argues that a 2002 amendment to the mandatory penalty provision, which allowed section 13385, subdivision (i) violators in certain circumstances to direct penalty funds to an environmental remediation project in lieu of paying the penalty to the state fund (§ 13385, subd. (*l*) (Stats. 2002, ch. 1019, § 3)), demonstrates that even the Legislature recognized the mandatory penalties were too severe. But that amendment did

not reduce the amount a discharger must pay under the mandatory minimum penalty provision; it simply redirected a portion of the funds into "an environmentally beneficial project . . . that would not be undertaken in the absence of an enforcement action" under section 13385. (§ 13385, subd. (*l*)(1), (2) (Stats. 2002, ch. 1019, § 3).) The financial burden on the discharger remains the same.

7. *Procedural Violations*

Finally, the City argues that the imposition of significant mandatory penalties without providing adequate procedural safeguards violated its substantive due process rights. The City is conflating its claims for procedural and substantive due process violations. The Supreme Court has not identified procedural violations as a relevant consideration in substantive due process analysis. We reject the City's arguments that its procedural due process rights were violated in the administrative proceedings.

We conclude that the imposition of $243,000 in penalties on the City was consistent with the purposes of section 13385 and the Porter-Cologne Act and did not violate substantive due process guarantees.

V. *Procedural Due Process*

The City argues that the Board violated its procedural due process rights by limiting its presentation of evidence at the hearing and denying it an opportunity to cross-examine the Board's witnesses and rebut certain of the Board's arguments.

Again, a threshold question is whether the City may assert a due process claim against the State of California, the political entity that created it. In the procedural due process context, one court has observed that the *Starkist* rule was "shocking in the abstract and unfair in its application" in the case before it. (*Santa Monica Community College Dist. v. Public Employment Relations Bd.* (1980) 112 Cal.App.3d 684, 690.) We need not reach the issue here because even assuming that the City may assert its due process rights against the Board, it has failed to establish any violations of those rights.

The constitutional requirement of procedural due process applies to administrative proceedings. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.) " 'Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest.'" (*Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 554-555 (*Cohan*), quoting *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) "'A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test and explain it.'" (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1172, quoting *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159.) Parties have "a right to know what they need[] to prove to satisfy their burden of proof at the hearing." (*Cohan*, *supra,* 30 Cal.App.4th at p. 557.)

Whether a hearing meets the minimum constitutional standards of due process is a mixed question of law and fact. (*Nightlife Partners, supra,* 108 Cal.App.4th at p. 87.) "To the extent that there are conflicts in the evidence of what occurred at the hearing . . . we view the evidence in the light most favorable to the trial court's decision. We then apply a de novo review as to whether such facts support the trial court's conclusion of law that the hearing was unfair." (*Ibid.*)

The City argues that it was unfairly restricted in three ways: (1) it was misled into believing that it would have 60 minutes to present its case and thus, when it unexpectedly learned midway through its presentation that it was limited to ten minutes, it was unable to present all important aspects of its argument; (2) it was not given an opportunity to respond to statements by Board staff members regarding the applicability of the exceptions in section 13385, subdivision (j)(1); and (3) it was denied an opportunity to respond to speculative opinion testimony regarding the cause of the effluent limitation violations.

A. *Time Restrictions*

The City did not have reasonable grounds for believing that it would have 60 minutes to make its presentation to the Board. An advance agenda sent to the City included a 60-minute time slot for consideration of the civil liability complaint against the City, and the agenda clearly stated that the "goal is to complete all presentations, cross-examination, Board deliberation and voting within the allotted time." Also, on July 10, 2001, the City received a notice of public hearing that expressly informed the City that its oral testimony might be limited to ten minutes and that oral testimony should simply summarize written submittals. Written comments submitted by July 20, 2001 (apparently unlimited in length or number) would have been incorporated into the administrative record, yet the City failed to submit any writings to the Board. By relying on the opportunity to make a 60-minute oral presentation to the Board, the City acted unreasonably and if there was prejudice, it resulted from the City's own actions.

The record does not support the City's contention that it was forced to truncate its prepared presentation during the actual hearing. After a brief introduction and overview by City Attorney Dennis Beougher, City engineer Paul Eldredge testified without interruption, producing testimony that filled seven pages of the reporters' transcript. Kenton Alm, the City's special legal counsel, suggested that the City may have planned "a little more than is appropriate at this time of day," but then testified without interruption, filling five and one-half pages of the reporters' transcript. Alm concluded with the statement, "Those are my comments. Thank you," indicating that he had nothing further to add. Although the Board chairman then invited Alm to make a closing comment, Alm said, "I think that concludes it." He then took advantage of the opportunity to drive home his point that the natural phenomenon exception applied. Alm claims that later in the hearing he attempted to make additional comments and objections, but "[a]lthough I caught Chairman Schneider's eye on several occasions, he declined my obvious attempts to gain the floor." This nonverbal attempt to gain the floor or register

an objection was an inadequate means of asserting the City's rights. (See *Reed v. California Coastal Zone Conservation Commission* (1975) 55 Cal.App.3d 889, 895-896; *Tennant v. Civil Service Com.* (1946) 77 Cal.App.2d 489, 498-499.) In sum, the evidence in the record readily supports an inference that the City was able to make its presentation without interruption or curtailment.

B. *Cross-Examination/Rebuttal*

The City also claims that after the close of the City's presentation, "Board staff presented inaccurate information on the applicability of the exceptions in section 13385(j), but the Board refused to recognize the City's attorney when he tried to gain the floor to rebut this testimony." Again, Alm's nonverbal attempts to lodge an objection were inadequate to preserve the City's procedural objections. Second, the issue of whether the natural phenomenon exception applied to the City's violations was addressed in the City's written response to the administrative complaint, the Board staff's initial presentation at the hearing, and the City's own presentation. Some party has to have the last word. The City was advised ahead of time that Board staff would have the opportunity to make closing comments, which is typically a prosecutor's prerogative. The City does not specify what particular comments required rebuttal and none are apparent from our review of the testimony. We perceive no violation of the City's right to rebut the evidence against it.

C. *Speculative Opinion Testimony*

Finally, the City argues that it was denied an opportunity to respond to speculative comments by Board staff members that the dissolved oxygen violations may have been caused by construction activity at the plant site. The City cites staff comments during the opening presentation to the Board and at the conclusion of the hearing. The City expressly declined to ask questions of Jauregui, the staff member who made the initial presentation. Nor did it respond to Jauregui's comments during its main presentation.

Having failed to use its presentation time to respond to the comment, or to ask for additional time so that it could respond to the comment, the City cannot now complain that the allegedly inaccurate comment stood uncorrected.

DISPOSITION

The judgment is affirmed.

GEMELLO, J.

We concur.

JONES, P.J.

SIMONS, J.

Trial court:	Alameda County Superior Court
Trial judge:	Hon. James A. Richman

Counsel for petitioner and appellant:

Meyers, Nave, Riback, Silver & Wilson, Kenton L. Alm, Andrea J. Saltzman and Julia L. Bond

Counsel for respondent:

Bill Lockyer, Attorney General, Mary Hackenbracht, Supervising Assistant Attorney General, Ellen Peter and Linda L. Berg, Deputy Attorneys General